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74-6263

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

MAMIE LEE WARD,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 286 NC 304, 210 SE 2d 407 (1974) and is appended to Petitioner's petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of eighteen veniremen on the ground of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth Amendment to the Constitution of the United States by depriving petitioner of a representative jury selected from a fair cross-section of the community?

3. Whether the Sixth or Fourteenth Amendment to the Constitution of the United States requires that a verbatim transcript be made of the voir dire examination of prospective trial jurors in a capital case, so as to assure a record of sufficient completeness to preserve a capital defendant's rights against unconstitutional methods of jury selection such as those condemned by Witherspoon v. Illinois, 391 US 510 (1968)?

STATEMENT OF THE CASE

Petitioner, Mamie Lee Ward, was tried and convicted in the Superior Court, Edgecombe County, North Carolina of first degree murder of Frank Parker.

Petitioner had known the deceased for approximately twenty years and had been living with him for three years until about two months before the killing. Petitioner had moved out of deceased's home in May, 1973, so that she could live with her daughter, who had moved back to the area.

On the evening of July 19,1973, the deceased, Frank Parker, was sitting in his living room with Lucy Taylor. Lucy Taylor testified that she had been Frank Parker's girl friend for about five months. Frank Parker was eating and Lucy was sitting beside him talking on the telephone when the petitioner, Mamie Lee Ward, entered the room and shot Frank Parker in the face, instantly killing him. Lucy Taylor arrived at the Parker home at approximately 7:30 that evening. Upon entering the home she found Frank Parker speaking on the telephone in the bedroom and she went into the den where Parker later joined her. They sat together and had talked for some time when the telephone in the bedroom rang. When Lucy answered the phone, no one responded. She then carried the telephone, which had an extension cord, into the den where she and the deceased continued to talk.

Subsequently, she heard some noise on the front porch and shortly thereafter heard some noise at the backdoor and mentioned this fact to Parker. Parker stood up and walked to a place in the room where he could see both the front and the backdoor and stated that if anyone wanted to come into the home they would have to knock. Parker then returned to the couch beside her and, at her request, dialed a telephone number for her and she began talking on the phone. While talking on

the phone she heard a noise in the living room and upon looking up saw the petitioner Mamie Lee Ward, standing in the doorway between the den and living room carrying a shotgun. The petitioner immediately fired the gun at Parker striking him in the face. Lucy Taylor does not remember that any words were spoken by either party prior to, or after, the shooting. Petitioner then broke the gun open and was apparently attempting to put another shell in it when she (Lucy Taylor) quickly got up and departed the house through a back window.

Police Detective A. F. Watson testified that on July 19, 1973, he received a call to go to the Parker home to investigate a shooting. As he was responding to this call he received another call to come to the Police Department because Mamie Lee Ward, the petitioner, was at the police station. Upon arriving at the police station he talked to the petitioner, advised her of her rights, and had her sign a statement to the effect that she was aware of her rights and did not desire to have a lawyer present. Petitioner then told him that she had shot Parker at his home; that she had gone to Parker's home and had walked in the back room; that Parker had seen her and motioned her in the back bedroom; that she then went to the back bedroom where she sat on a bed; that while sitting on the bed she saw a gun on the wall; that she took the gun from the wall, and went into the den where she saw Parker sitting with Lucy Taylor on the couch and shot him.

Dr. Frank Walton Avery, a pathologist, testified that he examined the body of the deceased and, in his opinion, the deceased died as a result of a hemorrhage secondary to a shotgun wound to the face.

The petitioner testified that she was fifty-two years old and had known Frank Parker for more than twenty years and had lived with him for approximately three years. Although she did

not at the time of the killing live with Parker, she testified that her relationship with him had continued and she frequently spent the night at his home and he frequently came by her home to see her. She testified that on the evening of July 19, she took a cab to Parker's house and, upon arriving there, went to the backdoor. She entered the backdoor without knocking because she considered it her home and had never knocked before. Upon opening the backdoor she heard Lucy Taylor tell the deceased that "There's somebody walking around in your house." Upon being told by Ms. Taylor that someone was in his house, the deceased got up and came into the kitchen where he waved her to go into the back bedroom. She went in the back bedroom and sat on the bed and then subsequently got up, obtained a gun from the wall and went in the den where the deceased was sitting and shot him. After shooting the deceased she left the house and thereafter went to the police station where she turned hereself in.

During the selection of petitioner's jury, the veniremen were questioned concerning their religious and conscientious scruples against the death penalty. Eighteen veniremen were excluded by the State for cause on account of such scruples. The voir dire examination of these jurors was apparently not recorded but the Judge made a statement for the record concerning the examination and excusal of these prospective jurors. See page 9, infra.

Upon proper instructions by the Judge, the jury found petitioner guilty of first degree murder and the Court thereupon sentenced her to die. The Supreme Court of North Carolina affirmed petitioner's conviction and sentence to death on September 30, 1974. Execution of the judgment was stayed on January 9, 1975 by Chief Justice Susie Sharp in order to allow a petition for writ of certiorari to be filed in this Court.

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is no valid reason for the Court to grant certiorari at this time to hear this question. This Court in the case of Fowler v. North Carolina, No. 73-7031 (Oct. Term, 1974) granted certiorari to Petitioner Jessie Thurman Fowler to hear this identical question. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975. This question therefore has been presented to the Court, has been accepted for hearing by the Court and oral arguments before this Court have already been made. Therefore, any decision in this case should be dependant upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

II. THE EXCLUSION FOR CAUSE OF EIGHTEEN VENIREMEN ON THE GROUND OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY DEPRIVING HER OF A REPRESENTATIVE JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Petitioner contends that the examination of eighteen veniremen with respect to the veniremen's expressed attitude towards returning a verdict which involved the death penalty lead to improper exclusion of jurors.

The case of Witherspoon v. Illinois, 391 US 510, 83 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), establishes two things: (1) veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; and (2) veniremen who are unwilling to consider all of the penalties provided by law and who are irrefutably committed before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial,

may be challenged for cause on that ground. In Witherspoon at 518, this Court said:

> "The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death a proper penalty. But in Illinois, as in other states, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in such decision."

This language from Witherspoon reflects an important ground of the reasoning in that case...a line of argument that is no longer applicable in North Carolina following the decisions of this Court in Furman v. Georgia, 408 US 238 (1972) and the Supreme Court of North Carolina in State v. Waddell, 282 NC 431, 194 SE 2d 19 (1973). North Carolina jurors no longer decide whether death is "the proper penalty", for the law now requires that the penalty of death be adjudged for the ennumerated crimes.

While petitioner's argument that "identifiable segments of the community [cannot be systematically excluded from jury panels]" correctly states the law, that proposition is not exactly in keeping with the principles stated by this Court in Witherspoon.

> "...nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra., footnote 21 at p. 522.

Such veniremen as were excluded, although they may constitute an identifiable segment of the community, have no place on a jury, the sole function of which is find guilt or innocence. Their views respecting the propriety of the death penalty are a

mere irrelevancy where the penalty is set by the law, and the jury has no discretion to set the penalty. All that happened in this case, is that the Court held that each of the eighteen veniremen could be excluded. The question, therefore, is one of the application of settled law to familiar facts and is not sufficiently important to review.

The right guaranteed by the Sixth Amendment is a right to a trial by an impartial jury; and it is this right which applies to the State by the due process clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 US 145, 20 L.Ed. 2d 491. Except where racial exclusion is involved, an impartial jury means only a neutral one. Fay v. New York, 332 US 261, 91 L.Ed. 2043. Only juries which are prejudiced, Shepherd v. Maxwell, 384 US 333, 16 L.Ed. 2d 600; Witherspoon v. Illinois, 391 US 510, 20 L.Ed. 2d 776, or partially or mentally incompetent, U.S. ex rel Leguillou v. Davis, 115 F. Supp. 392 (D.C. vi 1953) do not meet this standard. The "broad cross-section" or "truly representative cross-section" requirements appearing in many Federal cases are not constitutionally mandated, Salisbury v. Grimes, 406 F. 2d 50, (5th Cir. 1969); Christian v. Maine, 404 F. 2d 205 (1st Cir. 1968); and in order to fulfill constitutional requirements the States are only required to utilize a cross-section suitable in character and intelligence. Brown v. Allen, 344 US 443, 97 L.Ed. 469. Under Witherspoon then, a venireman should be willing to consider all the penalties which are provided by State law and he should not be irreparably committed before the trial has begun to vote against the death penalty regardless of any circumstances and facts which might be later introduced into evidence. Accord Boulden v. Holman, 394 US 478, 22 L.Ed. 2d 433, 89 S.Ct. 1138 (1969).

III. WITHERSPOON V. ILLINOIS, 391 US 510 (1968) DOES NOT REQUIRE THAT A VERBATIM TRANSCRIPT BE KEPT OF THE VOIR DIRE EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE.

During voir dire examination, eighteen prospective jurors were excluded for cause by the State when they stated on examination they would automatically vote against a death sentence verdict regardless of the evidence. The examination of those prospective jurors on voir dire was apparently not recorded and the trial judge entered into the record the statement as follows:

> "Court: Let the record show that during the State's examination of the jurors on voir dire as to their fitness and competency to serve as jurors on this case, the Solicitor [State's District Attorney] asked the jurors various questions concerning their views and feelings about sitting as a juror on this case wherein the defendant was charged with the crime of first degree murder and about a verdict which would result in the death penalty being imposed upon defendant if a verdict of guilty of first degree should be returned.
>
> Let the record further show that the Solicitor was allowed to challenge for cause eighteen prospective jurors after said eighteen jurors stated on voir dire that he or she would not under any circumstances, regardless of the evidence, consider joining in a verdict the result of which the death penalty would be imposed, but would automatically vote against such a verdict regardless of the evidence and would not even consider such a verdict in his or her deliberation of the case.
>
> The defendant objected to the Court allowing the State to challenge said jurors for cause on the above grounds for that it placed the defendant in an unequal position because it allowed the State to have unlimited challenges to prospective jurors while the defendant was limited to fourteen preemptory excuses of prospective jurors." (R p 4-5)

Petitioner contends that the trial court violated her constitutional rights under the Sixth or Fourteenth Amendment to the United States Constitution by not requiring a verbatim transcript of those proceedings. However, there is no constitutional requirement that a verbatim transcript be made of such proceedings. In Broussard v. State, 471 SW 2d 48, 50 (Tex. Cr. App., 1971), the Court in addressing this question stated:

> "It is advisable that the Court, in a death penalty case, whether requested by either party or not, have the Court reporter record the voir dire examination of the jury panel.[Citations omitted] However, it is not mandatory for the Court to do so when neither party requests it.... Joseph v. State, Tex. Ct. App., 444 SW 2d 396. When no transcription of the voir dire examination is contained in the record, nothing is presented for us to review. [Citations omitted]"

The petitioner did not object to the State excusing for cause the eighteen prospective jurors without keeping a verbatim transcript of the questions asked them. The petitioner's objection was to the Court allowing the State to challenge for cause prospective jurors "on the above grounds for that it placed the defendant in an unequal position because it allowed the State to have unlimited challenges to prospective jurors while the defendant was limited to fourteen preemptory excuses of prospective jurors". The petitioner's objection was to the State excusing those jurors who stated that they would automatically vote against a death verdict regardless of the evidence and would not even consider a verdict in their deliberation of the case. The defendant did not object to the statement that the trial judge made concerning the reasons why those prospective jurors were excused which was because they would not under any circumstances vote for the death penalty. There is therefore, a sufficient record for the purpose of appellate review to make it "unmistakably clear" and unambiguous" that the Witherspoon standards were met. Witherspoon v. Illinois, supra., Boulden v. Holman, supra., Maxwell v. Bishop, 398 US 262, 26 L.Ed. 2d 221.

In Edwards v. State, 253 So. 2d 513, 520 (Ala. 1971), the Court stated:

> "This Court is of the opinion that it is implicit in the Witherspoon holding that a full and complete transcript adequate for the purposes of appellate review must contain the proceedings incident to the selection and qualification of the jurors pertaining to capital punishment."

The Alabama Supreme Court decision in Edwards v. State, supra., did not hold that, absent a verbatim transcript, cases in which jurors had been excluded for cause for statements opposed to capital punishment, should be reversed. While the Court stated that a transcript should be made, it at the same time affirmed the decision of the lower Court on the basis of the Clerk's certificate in the record showing no juror raised his hand when all were asked to respond to a question regarding fixed opinions against capital punishment. This case, therefore, does not stand for the proposition that a verbatim transcript must be made of all voir dire questions and answers concerning prospective jurors' views on capital punishment.

In Beecher v. State, 256 So. 2d 154, (Ala. 1971) the record on appeal was void concerning the question of the excusal of jurors for cause on the basis of their views regarding capital punishment. The Court did not reverse the conviction, but returned the case to the trial court to determine whether jurors had been so excused.

In Evans v. State, 430 SW 2d 502 (Tex. Cr. App. 1968), the Court held that the refusal to grant motions by the defendant that the reporter take the voir dire examination of the jury panel deprived him of a transcript and thereby of his right to review under Texas law. However, in that case the record was completely silent as to the reasons for the exclusion of jurors because no record of any type was made of the proceeding.

In Petitioner's case, the trial judge set out in the record proper what action he took concerning excusal of the eighteen jurors and why the action was taken. Petitioner made no exceptions to the judge's findings or to the fact that a verbatim transcript of the voir dire examination was not made. The record does not reveal that petitioner made any motion requesting the Court reporter to record the questions put to and answered by prospective jurors who were excluded for cause. In Broussard

v. State, supra., the Texas Court held that absent such a motion by the defendant there was no requirement that a transcript of the voir dire examination of the jury panel be made. While it is true that Courts treat cases involving a death penalty with extraordinary care to insure that all procedures have been followed, Furman v. Georgia, supra., the petitioner at trial was satisfied with the method of jury excusal and should not now be heard to complain. She suffered no constitutional deprivation of any rights.

CONCLUSION

It is therefore respectfully submitted that the trial court did not deprive petitioner of any constitutional right by not insuring that a verbatim transcript of all questions propounded to and answered by prospective jurors be made; that the trial court did not violate any of petitioner's constitutional rights in excluding for cause prospective jurors who stated that they could not vote, under any circumstances, for a death verdict, and; that the imposition and carrying out of the sentence of death for the crime of murder does not violate either the Eighth of Fourteenth Amendment to the Constitution of the United States. The petition for writ of certiorari to the Supreme Court of North Carolina should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA on petitioner by depositing the same in the United States Mail to:

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This the 23rd day of April, 1975.

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